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20-P-408

Appeals Court

COMMONWEALTH vs. AGNES RICARDI.

No. 20-P-408.

Hampden. March 9, 2021. - April 16, 2021.

Present: Rubin, Blake, & Lemire, JJ.

Child Abandonment. Minor, Custody. Parent and Child, Custody.  
Department of Children & Families. Practice, Criminal,  
Dismissal.

Complaint received and sworn to in the Chicopee Division of the District Court Department on January 31, 2019.

A motion to dismiss was heard by Bethzaida Sanabria-Vega, J.

Joseph N. Schneiderman for the defendant.  
Kerry L. Koehler, Assistant District Attorney, for the Commonwealth.

BLAKE, J. The Commonwealth appeals from a District Court judge's order dismissing a charge of abandoning a child without support against the defendant, Agnes Ricardi. We conclude that the information contained in the criminal complaint application did not establish probable cause. Accordingly, we affirm.

1. Background. The defendant was charged with abandoning a child without support in violation of G. L. c. 273, § 1 (abandoning charge), and reckless endangerment of a child in violation of G. L. c. 265, § 13L. She filed a motion to dismiss both charges, contending that the complaint application failed to establish probable cause. After a nonevidentiary hearing, the judge, in a margin notation, allowed the motion as to the abandoning charge.<sup>1</sup> The Commonwealth appealed. See Mass. R. Crim. P. 15 (a) (1), as amended, 476 Mass. 1501 (2017).

We recite the facts set forth in the complaint application which included a detailed police report from Chicopee Police Detective Mathew Post. In early 2019, police officers were investigating the possible sexual exploitation of the defendant's sixteen year old child, Susan.<sup>2</sup> Area police departments and the Department of Children and Families (department) were assisting with the investigation. The investigators planned to conduct a multidisciplinary team (MDT) forensic interview of Susan, who had most recently run away from home on January 2, 2019 and was located at a shelter in Springfield on January 5, 2019.

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<sup>1</sup> The motion was denied as to the charge of reckless endangerment of a child.

<sup>2</sup> A pseudonym.

The investigators called Susan's parents, the defendant and Susan's father (father), who was the defendant's husband, and explained that their written consent was required in order to interview Susan. The defendant agreed to meet Detective Post in person at 1:45 P.M. on January 10, 2019 to sign the consent form.<sup>3</sup> When the defendant failed to appear at the agreed-upon time, police officers attempted to locate her. When officers arrived at the defendant's home, they observed padlocks on the gate surrounding the house; it was dark, and no one was present. On their forced entry of the house, the police found that clothing had been taken, hard drives from computers were missing, the defendant's work keys had been placed in a conspicuous location with instructions for their return to her employer, and the family's pet rabbit was gone.

On further investigation, police officers learned that the defendant had called out sick from work, and her other two children had been absent from school. Officers spoke with two of the father's siblings, who did not know where the defendant and the father were and expressed concern. Eventually, the police learned that the defendant, the father, and their other two children had crossed over the Canadian border from Vermont

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<sup>3</sup> The father was reluctant to give his consent. In addition, there was a concern that he may have abused Susan.

on January 10, 2019, the day the defendant failed to appear to sign a consent for the MDT interview.<sup>4</sup>

2. Susan's legal status. The question of Susan's status at the time the defendant failed to appear to sign the consent and subsequently left the country for Canada is critical to our review. We review the information set forth in the complaint application in the light most favorable to the Commonwealth. See Commonwealth v. Leonard, 90 Mass. App. Ct. 187, 190 (2016). Here, the complaint application contained several statements about Susan's status that were in conflict with one another. According to a timeline provided to Detective Post by the department, on January 7, 2019, the father learned from a Chicopee police officer that Susan had "turned herself in and was placed in foster care." And, the department informed the father that Susan was "in a foster home . . . because she reported not feeling safe at home and did not want to return at that time." However, on January 10, 2019, Detective Post noted that after the police discovered the status of the home, but prior to locating the defendant in Canada, the department "assumed emergency custody of [Susan]." The complaint application did not contain any reference to any court orders

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<sup>4</sup> Although the defendant speaks French, Susan knew of no reason why the defendant would flee to Canada.

regarding Susan's status, nor was there an explanation of Susan's foster care situation set forth therein.

3. Discussion. General Laws c. 273, § 1, provides in relevant part that a parent shall be guilty of a felony if (1) she abandons her minor child without making reasonable provisions for the child's support, or (2) she leaves the Commonwealth and goes into another State without making reasonable provisions for the support of her minor child.

Where a clerk-magistrate has issued a criminal complaint, "a motion to dismiss[] is the appropriate and only way to challenge a finding of probable cause." Commonwealth v. DiBennadetto, 436 Mass. 310, 313 (2002). "A motion to dismiss for lack of probable cause 'is decided from the four corners of the complaint application, without evidentiary hearing.'" Leonard, 90 Mass. App. Ct. at 190, quoting Commonwealth v. Humberto H., 466 Mass. 562, 565 (2013). "The complaint application must include information to support probable cause as to each essential element of the offense." Humberto H., supra at 565-566. Our review of a judge's probable cause determination is a question of law, which we review de novo. See id. at 566. As we have noted, we view the information set forth in the complaint application "in the light most favorable to the Commonwealth." Leonard, supra.

Probable cause "exists where the facts and circumstances . . . [are] sufficient in themselves to warrant a [person] of reasonable caution in the belief that an offense has been . . . committed" (quotation and citation omitted). Commonwealth v. Coggeshall, 473 Mass. 665, 667 (2016). "Probable cause requires more than mere suspicion, but it is considerably less demanding than proof beyond a reasonable doubt" (quotation and citation omitted). Id. "When applying this standard we are guided by the factual and practical considerations of everyday life on which reasonably prudent [people], not legal technicians, act" (quotation and citation omitted). Id.

Here, the Commonwealth argues that the complaint application established probable cause because the defendant deserted the family home, without intending to return, and fled the country in the "dead of winter with no responsible adult or parent available" for Susan. Contrary to the Commonwealth's position, the complaint application did not show, and we cannot infer, that Susan was abandoned. The application itself states at various points that Susan was in a foster home, that she was in foster care, and that the department had taken emergency custody of her. Indeed, Detective Post himself identified the father as the source of Post's information that Susan was in foster care or at a foster home. In common terms, foster care describes a situation in where a child lives with and is cared

for by people who are not the child's parents for a period of time, usually with the approval of a government agency. See Webster's Third New International Dictionary 897 (1993) (defining foster care and foster home). The goal of foster care is to provide temporary care for a child in order to keep the child safe and meet the child's ongoing needs. See id. The Commonwealth's obligation, as set forth in G. L. c. 119, § 23, requires, in pertinent part, that the department provide foster care for children according to department rules and regulations.<sup>5</sup>

Although not defined in G. L. c. 273, § 1, we have held that "criminal child abandonment means the child was left without making reasonable provisions for support." Adoption of Yvette (No. 1), 71 Mass. App. Ct. 327, 340 (2008). Moreover, in the context of the termination of parental rights, G. L. c. 210, § 3 (c), defines "abandoned" as "being left without any provision for support and without any person responsible to maintain care, custody and control [of a child] because the whereabouts of the person responsible therefor is unknown and reasonable efforts to locate the person have been unsuccessful." See G. L. c. 119, § 24, governing care and protection petitions

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<sup>5</sup> The department's regulations require that a child's placement be made "based upon safety, well-being and permanency of the child and the child's individual needs." 110 Code Mass. Regs. § 7.101(1) (2009). See Adoption of Talik, 92 Mass. App. Ct. 367, 375 (2017).

(incorporating definition of "abandoned, as defined in [G. L. c. 210, § 3]"). And, "the voluntary, physical relinquishment of a child by one with legal rights to the child" to another with legal rights does not constitute abandonment. Adoption of Yvette (No. 1), supra. See Guardianship of Zeke, 422 Mass. 438, 444-445 (1996).

Here, the complaint application failed to establish that the defendant legally abandoned Susan. In fact, the complaint application supported the inference that Susan was already either in foster care, a foster home, or in the department's custody at the time the defendant fled. Cf. Adoption of Yvette (No. 1), 71 Mass. App. Ct. at 340-341 (even if grandmother did abandon children in legal sense, children were committed to her care subject to supervision of out-of-State social services agency and city court). One additional observation is in order. Neither party points to any case, nor we have found a case, where G. L. c. 273, § 1, has been applied in circumstances similar to the factual background presented here. Although willful nonsupport remains a criminal offense under G. L. c. 273, see St. 1986, c. 310, §§ 22, 26 (amending G. L. c. 273, §§ 1, 15), the manner in which the Commonwealth asks us to apply this statute would potentially criminalize every parent who, believing their child is in the department's custody, leaves the

Commonwealth for an indeterminate amount of time.<sup>6</sup> In the context of care and protections proceedings, such an application would open the proverbial Pandora's box with a myriad of unintended consequences, including the possibility of a felony conviction.<sup>7</sup>

Order dismissing count 1 of  
the complaint, charging  
abandonment, affirmed.

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<sup>6</sup> Historically, the statute was applied to parents, usually fathers, who failed to provide financial support to their spouse or children. See, e.g., Ventura v. Ventura, 407 Mass. 724, 729 (1990) ("In the Commonwealth, parents of minor children have a legally enforceable obligation to provide sufficient support for their family. This obligation finds its source not only in the law, but also in the realm of community morality. [F]amily support obligations are deeply rooted moral responsibilities. A breach of a duty to support one's family is a crime against society." [Quotations and citations omitted]); Commonwealth v. Truczinskas, 318 Mass. 298, 298 (1945) (defendant convicted of violating G. L. c. 273, § 1, where "'being of sufficient ability,' he did unreasonably neglect to provide for the complainant, his lawful wife, against the peace of the Commonwealth and 'the form of the statute in such case made and provided'" [citation omitted]); Commonwealth v. Pouliot, 292 Mass. 229, 231-232 (1935) ("Manifestly, it is not slavery or involuntary servitude, as thus authoritatively defined, to sentence this defendant if he fails to perform his duty to support his family. The obligation of a husband and father to maintain his family, if in any way able to do so, is one of the primary responsibilities established by human nature and by civilized society. The statute enforces this duty by appropriate sanctions").

<sup>7</sup> Because we conclude that the complaint application was not supported by probable cause, we need not reach the defendant's claim that the clerk-magistrate was presented with a "recklessly misleading narrative." We also note that nothing herein precludes the Commonwealth from filing a new complaint supported by a more robust application.